IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

C. E. WYNN-JOHNSON,
Plaintiff in Error,

vs.

JAMES M. SHOUP, United States Marshal, for the District of Alaska.

No. 266.

In Error to the District Court of the United States for the District of Alaska.

BRIEF FOR PLAINTIFF IN ERROR.

Statement.

This case is before the Court on writ of error to the United States Court for the District of Alaska, Division No. 1, sued out by plaintiff in error on the 19th of January, 1903, directing that court to send its record and proceedings in the above-entitled cause to this Court, that the errors, if any, may be duly corrected and full and speedy justice done said plaintiff in error.

The proceeding in the court below was an application for a writ of *habeas corpus*, filed October 29, 1901, requiring

the marshal to produce the body of plaintiff in error before the court to do and receive what might then and there be considered by the court concerning him. The trial court has so tersely and accurately stated the facts as to the proceedings and the question involved that we quote from the same, pp. 10 and 11 of the record, as follows:

"At the Skagway, October 1901, term of the court one C. E. Wynn-Johnson and the Moore's Wharf Company were jointly indicted under sections four hundred and sixty and four hundred and sixty-one of the crimes act of the District of Alaska, for conducting a wharf, &c., without first having obtained a license therefor as required by law. A bench warrant was issued upon said indictment and the said C. E. Wynn-Johnson taken into custody by the United States marshal and brought into court. The said Johnson having failed and refused to give bail as required by law, he was retained in the custody of the United States marshal, and while so in custody he brought this proceeding in habeas corpus and prays to be discharged from custody.

"No objection is made to the indictment, either in form or substance, or to the writ under which the United States marshal holds the said Johnson in custody; but counsel for said Johnson alleges that the statute requiring the payment of this license fee is unconstitutional and void, and that the said Johnson should be discharged from custody for that reason. The alleged unconstitutionality of the act of Congress is predicated upon the claim that such statute is in violation of that provision of the Constitution requiring uniformity in the laying and collection of taxes in the District of Alaska; in other words that it is in violation of the first clause of sec. 8, art. 1, of the Constitution of the United States, which reads as follows:

> 'The Congress shall have power to lay and collect taxes, duties, imposts, and excises to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States.'

"The Acts of Congress providing for customs duties and internal revenue have for years been extended to Alaska by express act of Congress, and all such collections of taxes and the laws under which made, were in force in Alaska at the time the act in question was passed. It will also be remembered that by the Acts of Congress, the Constitution of the United States and its beneficent provisions has been extended to Alaska, impliedly at least, if not in express terms

"Under the laws of the United States license taxes of the form attempted to be enforced in Alaska are not collected in any other part of the United States. On the face of the proposition it would seem that the question of uniformity of taxation under the Constitution, is fairly raised."

Upon the final hearing, June 20, 1902, the Court, declining to pass upon the alleged unconstitutionality of the law involved, refused to grant the writ and discharge the said Johnson, as prayed for in the petition, but remanded him to the custody of the marshal to be held for trial on the indictment presented against him as aforesaid

The applicant, on said 20th day of June, 1902, prayed an appeal to this Court, from said decision, and filed his Bill of Exception and Assignment of Errors.

Argument.

There is but one question involved in this case, and that is the constitutionality of sections 460 and 461 of "An Act to define and punish crimes in the District of Alaska and to provide a code of criminal procedure for said district", approved March 3, 1899. (30 Stat., 1336.)

Section 460 provides as follows:

"That any person or persons, corporations or company, prosecuting or attempting to prosecute any of the following lines of business within the District of Alaska shall first apply for and obtain license so to do, from a district court or

subdivision thereof in said district, and pay for said license for the respective lines of business and trade as follows, to wit:"

Then follows a list of forty-two callings and occupations, among which, applicable to the present case, is the following:

"public docks, wharves and warehouses, one hundred dollars per annum".

Section 461 makes a violation a misdemeanor punishable by fine in a sum equal to the amount of the license, for the first offense; for the second offense double that sum, and for a third offense three times the amount of the license and imprisonment for not less than thirty days and not more than six months. It also provides that each day's business done or attempted to be done in violation of the act shall constitute a separate and distinct offence.

Section 463 is as follows:

"That the licenses provided for in this Act shall be issued by the clerk of the district court or any subdivision thereof, in compliance with the order of the court or judge thereof duly made and entered; and the clerk of the court shall keep a full record of all applications for license and of all recommendations for and remonstrances against the granting of licenses and of the action of the court thereon. The clerk of the court shall be entitled to receive for each applicant for a license a fee of five dollars, and no other or additional compensation shall be paid such clerk for his services in connection with such license or the issue thereof; *And provided*, That the clerk of said court and each division thereof shall give bond or bonds in such amount as the Secretary of Treasury may require and in such form as the Attorney General may approve, and all moneys received for licenses by him or them under this Act shall be covered into the Treasury of the United States, under such rules and regulations as the Secretary of Treasury may prescribe."

By subsequent legislation (Acts of June 6, 1900, 31 Stat. L., 320, and March 3, 1901) the license tax on public docks, wharves and warehouses, was increased, by the Act of June 6, 1900, to "ten cents per ton on freight handled or stored;" and by the latter act, fifty per cent. of these license fees were directed to be spent for school purposes in Alaska.

The trial judge, although holding that his court not being a constitutional court, but a creature of Congress, had no power to declare a law of Congress unconstitutional, yet entered into an elaborate discussion of the reasons urged by plaintiff in error why the statute should be so held, and after quoting the statute, said:

"Does this language 'covered into the Treasury of the United States' necessarily mean that the money shall go into the Treasury for general purposes and to be paid out upon appropriations made by the Congress of the United States? If this is the necessary construction of the statute, and if there be any such balance to go into the United States Treasury, it would seem that as to such balance there was a gathering of taxes contrary to the constitutional provision of uniformity. It is a fact about which there can be no dispute that the expenditures of the General Government for local government in the district of Alaska far exceeds the moneys collected from license taxes; but the salaries of officers such as governor, secretary, judges, marshals, &c., are paid out of the National Treasury on appropriations made by Congress from moneys in the Treasury of the United States. Such expenditures on appropriations made by Congress, though for support of local government in Alaska, can hardly be deemed the application of moneys realized from the collection of license taxes within the district of Alaska, to the support of local government in said district. But where the language of the statute is 'covered into the Treasury of the United States ——— under such rules and regulations as the Secretary of Treasury may prescribe,' such 'rules and regulations' might refer to the purpose for which the money was to be paid into the

Treasury and that purpose, its expenditure for local government.

Should we not therefore indulge in the presumption that by the use of the words 'covered into the Treasury under rules and regulations prescribed by the Secretary of Treasury' that Congress intended money should be covered into the Treasury for lawful purposes, viz., to be expended for local government rather than for an unlawful purpose, in violating the constitutional provision of uniformity."

It is thus conceded by the trial court that unless the provision in the law authorizing the Secretary of the Treasury to make "rules and regulations" governing the "covering into the Treasury of the United States" of the balance of the moneys remaining after the expenditure for schools of fifty per cent thereof, and incidental expenses of the court, stamps the whole amount as *local taxes*, the act is unconstitutional and void. We will therefore proceed to the discussion of this proposition.

It will be observed that the "rules and regulations" which the statute authorizes the Secretary of Treasury to prescribe, upon which provision the trial judge based his opinion, by its very terms apply *only* to "covering the money *into* the Treasury" and in no wise affect its disbursement or the purpose for which it may be used. It is therefore of no importance whatever in determining the character of the legislation. Moreover, we are not permitted to indulge in presumptions as to the use of money once "covered into the Treasury" by law. The Constitution settles that question beyond the possibility of a doubt. Article 1, section 9, clause 7 of that instrument is as follows:

"No money shall be drawn from the Treasury but in consequence of appropriations made by law".

It follows, therefore, that money covered into the Treas-

ury can be withdrawn only upon *appropriation by Congress.* Neither the Secretary nor the courts have the power to disburse a single cent otherwise. Hence, the funds arising from licenses in Alaska, when they reach the Treasury, under the law, or the rules and regulations which the Secretary may prescribe, become *eo instanti* a part of the general public funds, no more charged with payment of the local expenses of the District of Alaska than are the moneys arising from customs, or internal revenue, collected there, or funds collected in Maine or California.

But the theory of the trial court that these funds might have been made local by rules and regulations which the Secretary of Treasury was authorized to prescribe is shown to be erroneous by the letter of the Acting Secretary appended hereto as Exhibit "A", from which the Court will see that *no rules or regulations* were ever promulgated by that officer.

That letter also shows that of the license fees collected in Alaska in the years 1900 to 1903, both inclusive, and six months of the year 1904, the following sums were covered into the Treasury as provided by law.

Statement of Receipts from License Fees in Alaska.

Year.	License fees.	License fees collected outside of incorporated towns.	License fees collected in incorporated towns.
1900	$157,234.94		
1901	147,255.33		
1902	1,477.49	$71,864.82	$22,463.30
1903	.....	46,413.98	26,985.00
6 mos. of 1904	.....	40,921.81	23,931.78
Total	$305,967.76	$159,200.61	$73,380.08

It also appears that of said sum of $305,967.76, the sum of $98,642.02, being a part of the amount collected

outside of incorporated towns, has been set aside for expenditure by the Secretary of the Interior for school purposes under the provisions of the Acts of March 3, 1901, and March 2, 1903, and *all of the balance* is in the *general fund of the Treasury.*

It is thus made clear that the sum of $207,325.74, arising from such license fees has been covered into the Treasury, as balances, after the payment by the clerks of the Courts of all sums authorized to be disbursed by them under the law, and the setting aside of the sum required by the Secretary of the Interior for schools. The Secretary also states that these fees (those collected outside of incorporated towns) together with the license fees collected in incorporated towns, " were covered into the Treasury *as a part of its general fund.*"

We have thus shown that the theory upon which the trial court based its opinion is erroneous for two reasons:

First: Because, under the Constitution, no money can be drawn from the Treasury but in consequence of appropriations made by law; and

Second: Because the Secretary of the Treasury made *no rules or regulations* under the Act.

Not Local but General Taxation.

That taxes levied by Congress, which, when collected are required to be covered into the Treasury of the United States, and when thus covered in, become, in the language of the Secretary, " a part of the general fund of the Treasury," and under the Constitution can be drawn out only on appropriation by Congress, are general and *not local* should require no argument.

That a part of the taxes raised by such Act are directed to be expended in the community where collected, for local

purposes, is of no consequence, so long as *any part* of it goes into the general fund of the Treasury. For if Congress has the power to violate the principle of uniformity prescribed by the Constitution as to fifty per cent. of the taxes raised, it has the power likewise to violate it as to the whole of such taxes.

The Acts violate Sec. 8, Art. 1 of the Constitution.

We assume that it will not be disputed that if not local taxation it violates the first clause of Sec. 8, Art. 1, of the Constitution of the United States, which reads as follows:

"The Congress shall have power to lay and collect taxes, duties, imposts, and excises to pay debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States."

It will not be contended that such taxes are uniform throughout the United States, but in point of fact it is admitted by the trial Court that they are not levied in any other part of the United States.

The true rule upon this subject was stated by this Court, Mr. Justice Miller delivering the opinion, in the case of Edye *vs.* Robertson collector, (112 U. S., 580) as follows:

"The tax is uniform when it operates with the same force and effect in every place where the subject of it is found."

In that case the Court illustrated the proposition as follows:

"Is the tax on tobacco void, because in many of the States no tobacco is raised or manufactured? Is the tax on distilled spirits void, because a few States pay three-fourths of the revenue arising from it?"

But, in the case at bar, although the same occupations

are followed in almost, if not quite every State and Territory throughout the United States, these license taxes are confined by these Acts to Alaska alone.

If it be contended that they may fall under the police power, and may be for regulation or restriction, as is usual in the sale of liquors; we answer, that license can be required under that power only in cases when the calling is dangerous to the public either directly or incidentally. Hence, in the case at bar, which does not fall within such class, it must be exercised, if at all, under the power of taxation. Teideman on State and Federal Control of Persons and Property, Sec. 119, p. 482.

In order to justify a restrictive license, the business must itself be of such a nature that its prosocution will do damage to the public whatever may be the character of the qualification of those who engage in it. The power of license, as a police regulation, involves the power to prohibit under pain or penalty without a license and hence cannot apply to harmless callings. Tiedeman on State and Federal Control of Persons and Property, pp. 487 and 493.

This Court, in the case of Lawton *vs.* Steele, 152 U. S., 133, Mr. Justice Brewer delivering the opinion of the Court, in speaking of the *limits* of the police power, said:

"It is universally conceded to include everything essential to the public safety, health and morals. * * * But the legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual or unnecessary restrictions upon lawful occupations."

We respectfully submit that the decision of the United States District Court for the District of Alaska should be reversed and the plaintiff in error should be released on the grounds claimed by him, viz: that the Acts requiring a

license to follow a lawful, harmless occupation, confined as they are to Alaska, are unconstitutional, being a violation of the uniformity clause of the Constitution, as applied to the subject of taxation.

Respectfully submitted,

S. M. STOCKSLAGER,
GEORGE C. HEARD.

Exhibit "A."

Division of Bookkeeping and Warrants.
Q.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
WASHINGTON,
April 14, 1904.

MESSRS. STOCKSLAGER & HEARD,
Attorneys-at-Law,
McGill Building, Washington, D. C.

GENTLEMEN:

In reply to your communication of the 12th instant relative to the receipts from license fees in Alaska and their disposition, and asking for a copy of any regulations prescribed by the Secretary of the Treasury in connection therewith, I have to state as follows:

Statement of Receipts from License Fees in Alaska.

Year.	License fees.	License fees collected outside of incorporated towns.	License fees collected in incorporated towns.
1900	$157,234.94		
1901	147,255.33		
1902	1,477.49	$71,864.82	$22,463.30
1903	.....	46,413.98	26,985.00
6 mos. of 1904	.....	40,921.81	23,931.78
Total	$305,967.76	$159,200.61	$73,380.08

The sum of $305,967.76 received from "license fees" was covered into the Treasury by the clerks of court in one sum prior to the receipt of instructions from the Department of Justice to deposit them under separate heads. These fees, together with the license fees collected in incorporated towns, were covered into the Treasury as a part of its general fund.

Of the sum of $159,200.61 received from "license fees collected outside of incorporated towns," $98,642.02 have been set aside for expenditure by the Secretary of the Interior for school purposes under the provisions of the acts of March 3, 1901 (31 Stat., p. 1438) and March 2, 1903 (32 Stat., p. 946), and the balance is in the general fund of the Treasury.

In addition to the above amounts, the following sums have been covered into the Treasury by the clerks of court in Alaska: Funds other than license fees available for court expenses, $18,895.07; funds other than license fees not available for court expenses, $17,772.35.

No regulations have been prescribed by the Secretary of the Treasury governing the deposit of money under the Alaskan license laws, but a pamphlet containing detailed instructions in regard to the collection and deposit of license fees and other moneys by the clerks of court has been issued by the Department of Justice, a copy of which may be obtained on application to the Attorney-General.

Respectfully,

C. H. KEEP,
Assistant Secretary.